EDITOR'S NOTE

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1981

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Sun Ship, Inc.,

Petitioner,

v.

California and Hawaiian Sugar Co.
and
Halter Marine, Inc.,

Respondents.

OPPOSITION TO MOTION FOR DAMAGES AGAINST SUN SHIP

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California and Hawaiian Sugar Company ("C&H") has filed a Motion for Damages against Sun Ship, Inc. ("Sun"), for allegedly filing a "frivolous" Petition for Certiorari.

Sun's Petition and its forthcoming Reply Brief will speak for themselves. C&H made the same charge of "frivolousness" when Sun filed its Petition for Rehearing with the Ninth Circuit. Yet, in response to that Petition, the Ninth Circuit significantly modified its Opinion. Far from finding Sun's argument "frivolous," one Circuit Judge on the panel was moved to change her position and vote for a rehearing.

C&H's charges of "frivolousness" are intended to divert the Court from the really hard issues posed by the Ninth Circuit's opinion. Thus, C&H refuses to address the Ninth Circuit's finding that the Sun Barge Contract liquidated damages clause was not intended to function in the situation that actually arose: tug unavailability. Second, C&H does not explain how an award of $4.4 million dollars in liquidated damages can be justified under Pennsylvania law when the Ninth Circuit itself concedes that the actual damages can be no more than $368,000. Whether under the disjunctive test proposed by C&H or under Pennsylvania's conjunctive test, no liquidated damages clause may be applied in circumstances which were neither anticipated by the parties, nor reasonable by hindsight.

C&H would ask the Court to ignore the legal error, and find that this case is not "important" enough to merit review. But this case will affect more than one set of litigants contracting under the laws of a single jurisdiction. The commercial world increasingly relies on liquidated damage clauses to regulate its disputes. In most instances, these clauses are interpreted according to the Uniform Commercial Code and the Restatement (Second) of Contracts. Thus, the decision will be looked to by 52 jurisdictions which have adopted the Uniform Commercial Code

provisions for liquidated damages, and will be examined with particular closeness by the jurisdictions which also follow the Restatement in interpreting those provisions.

C&H alleges that Sun's Petition "rehashes issues of fact." But C&H fails to identify a single issue presented by Sun which properly constitutes a question of fact. Instead Sun's Petition asks this Court to consider (a) the proper Pennsylvania test for the validity of liquidated damages clauses, (b) Pennsylvania law with regard to liquidated damages clauses in multiple fault situations, and (c) the Pennsylvania one-satisfaction rule. These are issues of law, not fact. The contract interpretation issues presented by Sun are likewise reviewable, since in Pennsylvania (as everywhere else), such questions are questions of law. See Village Beer & Beverage, Inc. v. Vernon D. Cox & Co. Inc., 327 Pa.Super 99, 475 A.2d 117, 121 (1984).

That the District Court and the Ninth Circuit (both sitting in California) made the same mistake of Pennsylvania law is no reason to leave the decision stand. For unreviewed, the decision makes a mockery of Erie Railway Co. v. Tompkins, 304 U.S. 64 (1938). The Ninth Circuit arrogated to itself the right to ignore Pennsylvania and other UCC and Restatement precedent, and to formulate its own decisional law in a diversity case. That disregard of Pennsylvania law tramples the fundamental (and constitutional) right of the states to have the federal courts respect and apply their decisional law in diversity cases. This is hardly a frivolous issue.

Accordingly, C&H's ill-considered and ill-tempered Motion for Damages should be denied.

Dated: July 15, 1987

By /s/ Stan Arabis
STANLEY ARABIS

Counsel of Record for Petitioner
Sun Ship, Inc.

PROOF OF SERVICE BY MAIL

I, Susan Maunu, declare under the penalty of perjury that the foregoing is true and correct:

I am over the age of eighteen years of age, a United States citizen, a California resident, and am not a party to nor interested in the within action. My business address is One Embarcadero Center, Suite 2701, San Francisco, California 94111. On the date set forth below I served the following:

OPPOSITION TO MOTION FOR DAMAGES AGAINST SUN SHIP

on the following named persons by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States Mail at San Francisco, California addressed as follows:

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Executed at San Francisco, California, on June 29, 1987.

Susan Maunu